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No. 89-

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1989

HANOVER INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1) Does I.R.C. § 7481 — which states that a decision of the Tax Court becomes final "upon denial of a petition for certiorari" — mean that a decision of the Tax Court becomes final on the date when an order denying a petition for certiorari is entered?

2) Does Supreme Court Rule 23.3, which states that an order denying certiorari "shall not be suspended pending disposition of a petition for rehearing", mean that an order denying a petition for certiorari is final before the expiration of the period in which Supreme Court Rule 51 allows a party to petition for rehearing of the order?

3) Did the United States Court of Appeals for the First Circuit err in holding, contrary to the stated intention of Congress, that the provisions of Supreme Court Rule 51 effectively modify I.R.C. § 7481?

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No. 89-

In the

Supreme Court of the United States

OCTOBER TERM, 1989

HANOVER INSURANCE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Hanover Insurance Company ("Hanover") requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on August 7, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, *Hanover Insurance Co.* v. *United States*, 880 F.2d 1503 (1st Cir. 1989), and the relevant memorandum and order of the United States District Court for the District of Massachusetts, are reprinted in Appendix A and B.[1]

JURISDICTION

This Court has jurisdiction to review the judgment of the United States Court of Appeals entered on August 7, 1989 at 2:41 P.M., by writ of certiorari, pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The statute principally involved in this petition is I.R.C. § 7481(a)(2)(B), 26 U.S.C.A. § 7481(a)(2)(B) (1989), which in relevant part provides:

> **Date when Tax Court decision becomes final.**
>
> (a) Except as provided in subsections (b), (c), and (d), the decision of the Tax Court shall become final —
>
> * * *
>
> (2)(B) Upon denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals[.]

The full text of the statute is reprinted in Appendix C.

[1] Citations to an Appendix will refer to the Appendix and the page number of the Appendix, e.g. "App. A at 1a".

STATEMENT OF THE CASE

I. Facts

Hanover brought this action to secure the refund of $1,161,324.38 in asserted tax and interest liability illegally assessed and levied by the United States of America ("the Government"). Hanover asserts that the Government's assessment of tax against Hanover was barred by the statute of limitations on assessment.

That statute allows the Government to collect tax only if it is assessed within a specified period of time. I.R.C. § 6501(a). Assessment is a simple procedure. The Government places a taxpayer's name, the amount of tax owed, and certain other information, on a list. No notice that an assessment has taken place is necessary. The assessment procedure is complete when a form is filled out and signed by a Government official. I.R.C. § 6203 (1989); Treas. Reg. § 301.6203-1 (1988).

It is not necessary to recount the arcane method used to calculate the limitation period applicable to this case. Both Hanover and the Government are in agreement that the statute of limitations on assessment in this case expired 262 days after the relevant decision of the Tax Court became final. The only dispute concerns when that decision became final.

Hanover and the Government agree that I.R.C. § 7481 governs the question when a Tax Court decision becomes final. That statute states that a Tax Court decision becomes final "[u]pon denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals[.]" It is beyond contest that the relevant decision of the Tax Court was affirmed by the United States Court of Appeals for the First Circuit, and that Hanover's petition for a writ of certiorari was denied. *See*

Hanover Insurance Co. v. *Commissioner*, 69 T.C. 260 (1977), *aff'd* 598 F.2d 1211 (1st Cir.), *cert. denied* 444 U.S. 915 (1979). It is also not contested that if the decision of the Tax Court became final on the date that the Supreme Court entered its order denying the petition for certiorari, then the Government's assessment was 20 days too late.

The Government, having failed to assess the tax during the period of approximately eight months when the parties agree that assessment would have been proper, has asserted that the decision of the Tax Court became final not on the date that the Supreme Court entered its order denying certiorari, but upon the expiration of the 25-day period in which Supreme Court Rule 51 allows a party to file a petition for rehearing of the order of denial.[2] If this 25-day extension were added to the limitation period, then the Government's assessment would be timely.

II. Proceedings Below

Hanover filed this action to protest the Government's unlawful levy of more than $1 million. Jurisdiction in the United States District Court for the District of Massachusetts was proper pursuant to 28 U.S.C. § 1346(a)(1). The District Court, relying on *R. Simpson & Co., Inc.* v. *Commissioner*, 321 U.S. 225 (1944), held that the decision of the Tax Court became final 25 days after entry of the order denying certiorari, rather than "upon denial of a petition for certiorari." App. B at 18a. The United States Court of Appeals for the First Circuit affirmed that decision on August 7, 1989. App. A at 13a.

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[2] Supreme Court Rule 51 is reprinted in Appendix G at page 26a.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the effect of the Supreme Court Rules on a statute intended to operate without regard to the "usual rules of law applicable in court procedure."[3] The answers to these questions will have significant impact on the administration of the tax laws of the United States, and will help to define the limits of the Government's authority to assess and levy tax.

This case also presents an opportunity for the Court to correct an erroneous interpretation of the Supreme Court decision in *R. Simpson & Co., Inc.* v. *Commissioner*, 321 U.S. 225 (1944), by a United States District Court and a United States Court of Appeals.

I. The Court of Appeals Should Have Given Effect to the Plain Meaning of I.R.C. § 7481.

"[T]he starting point for interpreting a statute is the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must be regarded as conclusive." *Consumer Products Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language of I.R.C. § 7481(a)(2)(B) could hardly be more clearly stated. That statute states that when a decision of the Tax Court is affirmed by the Court of Appeals, and certiorari is denied, "the decision of the Tax Court shall become final . . . [u]pon denial of a petition for certiorari . . . ." If Congress had intended that the decision of the Tax Court become final upon the expiration of the rehearing period provided by Supreme Court Rule 51, then certainly Congress could have said so. It did not, and the courts below erred in holding that it did.

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[3] S. Rep. No. 52, 69th Cong., 1st Sess. (1926) reprinted in 1939 C. B. (Part II) 332, 360.

II. THE LEGISLATIVE HISTORY OF I.R.C. § 7481 CLEARLY CONTEMPLATES THAT "THE USUAL RULES OF LAW APPLICABLE IN COURT PROCEDURE" SHALL NOT AFFECT § 7481.

The legislative history of I.R.C. § 7481, far from expressing a legislative intent contrary to the plain meaning of that statute, contemplates that the statutory language shall prevail over the usual rules of court. I.R.C. § 7481 is essentially identical to § 1005 of the Revenue Act of 1926, 44 Stat. 110, 111.[4] *See* First Circuit Opinion, App. A at 5a. The Senate Report which accompanied § 1005 states that because

> the statute of limitations upon assessments and suits for collection . . . commences to run on the day upon which the [Tax Court's] decision becomes final, it is of utmost importance that the time be specified as accurately as possible. In some instances in order to achieve this result the *usual rules of law applicable in court procedure must be changed.*

S. Rep. No. 52, 69th Cong., 1st Sess. (1926) *reprinted in* 1939 C. B. (Part II) 332, 360 (emphasis added).

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[4] In 1939, § 1005 of that The Revenue Act of 1926 was consolidated into § 1140 of the Internal Revenue Code of 1939. The codification of 1939 was intended to combine in one reference source the country's many revenue provisions, then spread over the many volumes of the Statutes at Large, and made "no changes in existing law." *See* S. Rep. No. 20, 76th Cong., 1st Sess. (1939) *reprinted in* 1939 C. B. (Part I) 534, 535. In 1954, this provision was again relocated, this time to I.R.C. § 7481 (1954). Section 7481, as enacted, contained "no material change from existing law." H.R. Rep. No. 1337, 83rd Cong., 2d Sess. (1954) *reprinted in* 1954 U.S. Code Cong. & Ad. News 4017, 4582. Congress modified § 7481 in 1969 and 1988, adding a special procedure for cases involving $10,000 or less, and provisions regarding interest determination and certain estate tax issues, but the remainder of the 1926 provisions remained materially unchanged. *See* Pub. L. 91-172, Title IX, § 960(h)(1), 83 Stat. 734 (1969); Pub. L. 100-647, Title VI, §§ 6426(a), (h)(2), 102 Stat. 3751, 3752 (1988).

Congress made clear the "utmost importance" of precisely determining the date upon which a decision of the Tax Court becomes final, and also stated its intent that ordinary procedural rules must give way to the provisions of § 7481. Therefore the provisions of Supreme Court Rule 51 cannot alter the plain, clear, and comprehensive language of § 7481. The "short answer" to the First Circuit's holding that a decision of the Tax Court becomes final on some date other than the date chosen by Congress is "that Congress did not write the statute that way."[5] *See United States* v. *Monsanto*, ___ U.S. ___, 109 S.Ct. 2657, 57 U.S.L.W. 4826, 4829 (1989), *citing United States* v. *Naftalin*, 441 U.S. 768, 773 (1979).

III. *Simpson* Does Not Hold that the Supreme Court Rules Modify I.R.C. § 7481.

R. Simpson & Co., Inc. v. *Commissioner*, 321 U.S. 225 (1944), does not hold that a decision of the Tax Court becomes final 25 days after a denial of a petition for certiorari, rather than upon the date of the denial itself. In fact, *Simpson* does not address the question of when a Tax Court decision becomes final at all.

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[5] The First Circuit observed that words can be "chameleons", and that the word "final" was just such a "linguistic lizard." First Circuit Opinion, App. A at 2a. But, after recognizing that a word may have a multiplicity of meanings, the First Circuit based its decision on the apparently tautological observation that "a decision of the Tax Court becomes final only when, as a practical matter, it has become unalterable." *Id.*, App. A at 6a. This holding, essentially that "final" can mean only "final", ignores the fact that Congress has supplied its own definition of the term.

Congress, recognizing the potential for ambiguity subsumed in the concept of finality, has stated that a decision of the Tax Court becomes final "upon denial of a petition for certiorari" by the Supreme Court. I.R.C. § 7481(a)(2)(B). Once again, if Congress had intended that "the curtain of finality fall[ ] only when the petitioner's opportunity to play the encore has passed," First Circuit Opinion, App. A at 5a, then Congress could have said so. Instead, consistent with its desire to precisely identify the date upon which the statute of limitations begins to run, Congress chose a specific date: a decision of the Tax Court becomes final "upon denial of a petition for certiorari" by the Supreme Court.

In *Simpson*, a petition for certiorari was denied on November 9, 1942. *Id.* at 227. A petition for rehearing was not filed until February of 1943, long after the 25-day rehearing period had expired. Thus whether the Tax Court's decision became final upon denial of certiorari, or 25 days later, was not an issue in *Simpson*.

The question decided in *Simpson* was whether the Court had "jurisdiction to grant a rehearing in the case." *Id.* at 227. *See White's Will* v. *Commissioner*, 142 F.2d 746, 749 n.4 (3d Cir. 1944) (explaining Simpson).[6] The Court, after consideration of a predecessor to § 7481, determined only that it had no jurisdiction to rehear a petition for certiorari filed long after certiorari had been denied *and* the 25-day period had expired. The holding of *Simpson*, and the only issue with which the dissent in *Simpson* quarreled, was that a predecessor to § 7481 overruled the then prevailing notion that federal courts had the broad power to rehear an order at any time during the same term in which it was rendered.[7]

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[6] In *White's Will*, the Second Circuit correctly explained the holding in *Simpson*: "[T]he Supreme Court had denied a petition duly filed for certiorari. . . . Later, the petitioner requested leave to file out of time a petition for rehearing. . . . After a hearing on the jurisdictional question the Court held that after an order has become final *and* the prescribed time has elapsed, the statute (Section 1140) deprives it of jurisdiction." (citations omitted) (emphasis added).

[7] At the time *Simpson* was decided, federal courts reserved the power to grant a rehearing of a decision at any time during the term in which it was rendered. *See United States* v. *Ohio Power Co.*, 353 U.S. 98, 102-103 (1957); *Simpson*, 321 U.S. at 230 (Douglas, J., dissenting) (rules of the Supreme Court provide "authority to grant petitions for rehearing during the Term"). At the same time, Supreme Court Rule 33 allowed an unsuccessful petitioner for certiorari to seek rehearing within 25 days of the denial (even if the Term ended in the interim). *Simpson*, 321 U.S. at 229; Supreme Court Rule 33 (1939), App. at a. The dissent in *Simpson* merely argued that there was no basis for saying that one of these rules, and not the other, modified § 1140 of the 1939 Internal Revenue Code.

Thus *Simpson* cannot be viewed as determining when a Tax Court decision becomes final. Rather, the *Simpson* majority decided that as a matter of policy it would continue to apply Supreme Court Rule 33 to all cases, including tax cases, but would not apply the Court's power to rehear decisions within the same Term to tax cases in which the time to petition for rehearing had expired. *Simpson*, 321 U.S. at 230. The dissent merely argued that logic did not support this distinction.

The dictum in *Simpson*, 321 U.S. at 229-30, to the effect that the Court regarded denials of certiorari as "qualified" until the rehearing period expires, was clearly ancillary to the Court's decision that it had no jurisdiction to grant a rehearing long after the denial of certiorari *and* the expiration of the 25-day rehearing period. In any event, that comment was effectively rejected by the subsequent adoption of Supreme Court Rule 23.3.

IV. Supreme Court Rule 23.3 Provides that an Order Denying Certiorari Is Not Suspended During the Pendency of a Motion for Rehearing.

Supreme Court Rule 23.3 does not provide that an order denying certiorari is "qualified" during the Supreme Court Rule 51 rehearing period.[8] Instead, Rule 23.3 suggests that a decision of the Tax Court does become final upon entry of an order denying a petition for certiorari.

Rule 23.3 states:

> Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record. The order of denial *will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.* (emphasis added.)

Thus, Rule 23.3 gives an order denying certiorari immediate force and effect unless the Court or a Justice issues an order to the contrary.[9] *See Richmond* v. *Arizona*, 434 U.S. 1323, 1325-26 (1977) (Rehnquist, J.) (opinion in chambers).

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[8] Supreme Court Rule 23 is reprinted in Appendix D at page 23a.

In *Richmond*, Justice Rehnquist refused to suspend an order denying certiorari, despite a pending petition for rehearing, and despite the fact that the refusal allowed the petitioner to be put to death before any action was taken on his rehearing petition. Justice Rehnquist stated that "[a] motion for rehearing of an order denying certiorari does not automatically suspend the order . . ." *Id.* at 1325 (citing then Supreme Court Rule 25.2).[9] The order denying certiorari in that case, in light of Justice Rehnquist's refusal to stay the order or enter a stay of execution, could hardly have been more final.[10] *See also Flynn* v. *United States*, 99 L.Ed. 1298, 1299 (1955) (opinion in chambers).[11]

Because an order denying certiorari is effective immediately (absent intervention of the Court or a Justice), Supreme Court Rule 23.3 is both consistent with § 7481, which makes a decision of the Tax Court final upon denial of certiorari, and inconsistent with the *dictum* in *Simpson* that denial of certiorari is "qualified" until the rehearing period expires. *See Simpson*, 321 U.S. at 229-30. The fact that the Supreme Court Rules were different when *Simpson* was decided in 1944 explains

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[9] Rule 23.3, adopted in 1980, was in effect as Rule 25.2 in 1979. *See* 13 Moore's Federal Practice ¶823.02 (1988).

[10] In the present case, the Supreme Court's order denying certiorari was also final when it was issued. Hanover never asked the Court to stay the order, and never filed a petition for rehearing.

[11] In *Flynn*, the petitioners were on bail pending disposition of their petition for certiorari. Their petition was denied, and they sought a stay of notification under Supreme Court Rule 25.2 pending the filing and disposition of a proposed petition for rehearing. Justice Frankfurter directed that the order denying the petition for certiorari be withheld for five days, because the right to consideration of a petition for rehearing should not be "an empty formality," but ruled that if the petitioners did not make a showing of "substantial" grounds for rehearing within five days, thus generating an order by him for a stay under Rule 25.2, the order denying their petition for certiorari would issue automatically at noon on the fifth day. If the order denying the petition for certiorari were not a final order, there would have been no need to withhold it in order to protect the freedom of the petitioners.

that inconsistency. There was no Supreme Court Rule corresponding to Rule 23.3 in effect in 1944. *See* Revised Rules of the Supreme Court of the United States, 83 L. Ed. 1629 (1939). Indeed, the Court referred only to "the practice heretofore observed" of considering such orders qualified, and not to any specific rule. *Simpson*, 321 U.S. at 229.

When *Simpson* was decided, Supreme Court Rule 34 stated only that upon denial of a petition for certiorari, "the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record." *See* Revised Rules of the Supreme Court of the United States, 83 L.Ed. 1629, 1651 (1939); App. F at 25a. The additional sentence in current Rule 23.3, that "the order of denial will not be suspended pending disposition of a petition for rehearing except by order of the court or a justice thereof," is an additional reason why a denial of certiorari may not now be considered "qualified" during the period in which a petitioner might file a petition for rehearing.[12]

In order to make clear the limits of the Government's authority to assess and levy tax, to clarify the meaning of the Supreme Court Rules and their effect upon an otherwise unambiguous federal statute, and to correct an erroneous reading of *Simpson*, this petition for a writ of certiorari should be granted.

[12] There are a number of instances where a "final" order is issued by a court although further judicial action is possible. For example, an entry of judgment is no less "final" because a party may move to amend that judgment.

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the First Circuit 1a

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Memorandum and Order of the United States District Court for the District of Massachusetts 14a

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Appendix F

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Appendix A

United States Court of Appeals For the First Circuit

No. 89-1101

HANOVER INSURANCE COMPANY,
Plaintiff, Appellant

v.

UNITED STATES OF AMERICA,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. John J. McNaught, *U.S. District Judge*]

Before
Campbell, *Chief Judge*,
Torruella and Selya, *Circuit Judges*.

Harry T. Daniels with whom *Betsy Hecker*, *William H. Paine* and *Hale and Dorr* were on brief for appellant.

Charles Bricken, Tax Division, Department of Justice, with whom *James I.K. Knapp*, Acting Assistant Attorney General, *Peter A. Mullin*, Acting United States Attorney, *Gary R. Allen* and *Gilbert S. Rothenberg*, Tax Division, Department of Justice, were on brief for the United States.

AUGUST 7, 1989

SELYA, *Circuit Judge*. Judge Learned Hand once wrote that words can be "chameleons, which reflect the color of their environment. . . ." *Commissioner* v. *National Carbide Co.*, 167 F.2d 304, 306 (2d Cir. 1948). That was hardly news to generations of lawyers and judges, many of whom have learned, often at some cost, that the same language, used in different settings, may mean very different things. While the mechanical provisions of the Internal Revenue Code may seem to comprise an improbable habitat for such linguistic lizards, the portion of the Code's finality provision which we are called upon to construe today might well serve as an object lesson to those who persist in believing a word is a word is a word.

I

Plaintiff-appellant Hanover Insurance Company[1] brought this action in hot pursuit of a tax refund. While the origins of the pecuniary controversy stretch back nearly three decades (to 1959), we rehearse only those fragments of the background that are essential to place the present problem in perspective.

Subsequent to the filing of appellant's 1960 corporate return (at the times material hereto, appellant's tax year was the calendar year), the Internal Revenue Service (IRS) decided that taxes for 1959 and 1960 had likely been underpaid. During ensuing negotiations, Hanover agreed to a series of extensions, the net effect of which was to defer the deadline for deficiency assessment with respect to those taxes until mid-1971. On December 10, 1970, a formal notice of deficiency was mailed, asserting a tax shortfall of close to $900,000 (roughly half attributable to 1959 and half to 1960).

[1] By virtue of a 1961 merger, appellant became the successor in interest to Massachusetts Bonding and Insurance Co. For our purposes, any distinction between the two corporations is immaterial. Thus, we refer to them collectively and interchangeably as "Hanover" or "the Company."

The company did not go gently into this dear night; it contested the alleged deficiency and asked that its indebtedness be refigured. The Tax Court acted upon Hanover's petition, 69 T.C. 260 (1977), striking the deficiency for 1959 and slightly reducing the 1960 deficiency. We affirmed, 598 F.2d 1211 (1st Cir. 1979), and the company's ensuing petition for certiorari was thereafter denied, 444 U.S. 915 (1979). On July 23, 1980, the IRS assessed Hanover $690,207.83 in respect to 1960, a sum which represented the deficiency calculated by the Tax Court ($331,644.28) plus interest ($358,562.55). The government eventually collected upward of $1,000,000 (additional interest having accrued in the meantime).

Appellant filed a timely administrative claim for refund. When rebuffed, it brought suit in the district court under 28 U.S.C. § 1346(a)(1). This appeal followed the district court's entry of judgment in favor of the United States. The single issue before us concerns whether the assessment was timely.

II

As a general rule, absent fraud or agreed extensions, the IRS must assess taxes assertedly due within three years after a return is filed. *See* 26 U.S.C. § 6501(a). So long as "a proceeding in respect of [a] deficiency is [seasonably] placed in the docket of the Tax Court," 26 U.S.C. § 6503(a)(1), the mailing of a deficiency notice suspends running of the limitation period "until the decision of the Tax Court becomes final[ ], and for 60 days thereafter." *Id.*

In this case, the underlying facts are undisputed. The deficiency notice was mailed on December 10, 1970. At that point 202 days of the assessment period remained open vis-a-vis Hanover's 1960 taxes. A timeous Tax Court petition ensued, freezing the assessment period. *See* 26 U.S.C. § 6503(a). Given the appellate process invoked here, the Tax Court deci-

sion became final only "[u]pon [the Supreme Court's] denial of a petition for certiorari, . . . the decision of the Tax Court ha[ving] been affirmed . . . by the United States Court of Appeals[.]" 26 U.S.C. § 7481(a)(2)(B). Thus, the assessment period resumed its march 60 days after "denial" of the company's certiorari petition. *See* 26 U.S.C. §§ 6501(a), 7481(a)(2)(B).

To this juncture, the parties agree entirely. There is, of course, a rub: the Supreme Court issued an order denying certiorari on Octobert 15, 1979; the time for seeking reconsideration passed; the IRS served its assessment on July 23, 1980. This chronology makes it imperative to ask when, for purposes of section 7481(a)(2)(B), the "denial" of certiorari occurred. There are two candidates, one nominated by each party:

1. If — as Hanover contends — the denial took place contemporaneous with the entry of the Supreme Court's order, then the Tax Court's decision became final on the same date (October 15, 1979) and the count resumed 60 days later (December 14, 1980). On that hypothesis, the assessment period would have expired 202 days thereafter (July 23, 1980); consequently, the assessment, made on July 23, would have been untimely — and plaintiff's suit for a refund must be honored.

2. If — as the government contends — the denial did not occur until the expiration of the time within which Hanover, had it so chosen, might have petitioned as of right for rehearing of the order refusing certiorari,[2] then the Tax Court decision

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[2] Under the applicable rule, the incremental time amounts to an extra 25 days:

> .1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the court or a Justice. . . .
>
> .2. A petition for rehearing of an order denying a petition for writ of certiorari shall comply with all the form and filing requirements of paragraph .1, but its grounds must be limited to intervening

did not become final until November 9, 1979 and the limitation period did not run its course until July 28, 1980. On that premise, the July 23 assessment was timely — and plaintiff's suit was properly dismissed.

Refined to bare essence, these conflicting contentions require that we determine whether a decision of the Tax Court, affirmed by the court of appeals, becomes final for purposes of section 6501(a) upon denial of a certiorari petition or only upon expiration of the allotted period within which, following denial of certiorari, reconsideration may be requested. Despite the unvarnished language of 26 U.S.C. § 7481(a)(2)(B), we hold — as did the court below — that the curtain of finality falls only when the petitioner's opportunity to play the encore has passed. Accordingly, we affirm.

III

Section 7481 of the Internal Revenue Code has been virtually unchanged for approximately six decades. *Compare id. with* 26 U.S.C. § 1140 (1940) *and* § 1005(a), Revenue Act of 1926, ch. 27, 44 Stat. 110, 111 (1926); *see also* H.R. Rep. No. 1337, 83d Cong., 2d Sess. 434, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4017, 4582 ("no material change" in respect to section between 1940-1954); S. Rep. No. 20, 76th Cong., 1st Sess., *reprinted in* 1939-2 C.B. 534, 535 (similar, respecting period 1926-1940). The law's objective is crystal clear: "to determine definitely the date on which the statute of limitations, suspended during appeal, begins to run again. . . ."

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circumstances of substantial or controlling effect or to other substantial grounds not previously presented. . . .

. . . .

.4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this Rule, will not be received.

Sup. Ct. R. 51.

R. Simpson & Co. v. *Commissioner*, 321 U.S. 225, 228 (1944). Courts have nearly unanimously, albeit somewhat sporadically, interpreted the statutory provision to mean that a decision of the Tax Court becomes final only when, as a practical matter, it has become unalterable. *Kenner* v. *Commissioner*, 387 F.2d 689, 690-91 (7th Cir.), *cert. denied*, 393 U.S. 841 (1968); that is, when the courts no longer possess power to reopen the matter.[3] *See, e.g., Lasky* v. *Commissioner*, 235 F.2d 97, 98-99 (9th Cir. 1956), *aff'd*, 352 U.S. 1027 (1957); *White's Will* v. *Commissioner*, 142 F.2d 746, 748-49 (3d Cir. 1944); *Monjar* v. *Commissioner*, 140 F.2d 263, 265 (2d Cir. 1944); *McCarthy* v. *Commissioner*, 139 F.2d 20, 21-22 (1943); *Denholm & McKay Co.* v. *Commissioner*, 132 F.2d 243, 246-47 (1st Cir. 1942); *Sweet* v. *Commissioner*, 120 F.2d 77, 79-81 (1st Cir. 1941). In these cases, however, finality itself was not at issue; the petition to rehear or reopen was filed so far out of time that it proved unnecessary for the court of appeals to determine the precise date upon which finality attached to a Tax Court decision. Nonetheless, the reasoning of these opinions seems fully transferable to the matter at bar. And, while this may well be a case of first impression in the sense that the exact issue which is before us has never been the concern of the narrowest reading of the *ratio decidendi* of a court's decision, we find the path to be well lit and the outcome adumbrated by what has gone before. Congress's discernible vision, along with the clarity and consistency of the language employed by the Supreme Court in its relevant

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[3] The rule, of course, applies to *legitimate* decisions; the cases agree that in those rare instances where fraud on the court has been practiced, the judicial function itself has been undermined and the decision must be reopened to cleanse the process. *See, e.g., Toscano* v. *Commissioner*, 441 F.2d 930, 933 (9th Cir. 1971); *Kenner*, 387 F.2d at 691; *Sweet* v. *Commissioner*, 120 F.2d 77, 81 (1st Cir. 1941). Some courts have used the same rationale to reexamine matters upon discovery of mutual mistake, *see, e.g., La Floridienne J. Buttgenbach & Co.* v. *Commissioner*, 63 F.2d 630, 631 (5th Cir. 1933), but our decisions do not go that far. *See Sweet*, 120 F.2d at 81.

decisions, compels us to elect the government's interpretive candidate.

We note, not without a sense of irony, that Congress apparently recognized the desirability of requiring precise dating by means of the finality provisions of the Internal Revenue Code, and wanted the Code's provisions to be interpreted to further that end. *See, e.g.*, H.R. Rep. No. 1, 69th Cong., 1st Sess. (1926) *reprinted in* 1939-1 C. B. [Pt. II] 315, 329 ("it is of utmost importance that th[e] time [in which a decision of the Board of Tax Appeals becomes final] be specified as accurately as possible"); S. Rep. No. 52, 69th Cong., 1st Sess. (1926), *reprinted in* 1939-1 C.B. [Pt. II] 332, 360 (same). Indeed, the legislative history reflects that Congress was willing to go the extra mile: "In some instances in order to achieve the[ ] result [specific and accurate dating] the usual rules of law applicable in court procedure must be changed." H.R. Rep. No. 1, *supra*, 1939-1 C.B. at 329; S. Rep. No. 52, *supra*, 1939-1 C.B. at 360 (same). Put another way, Congress told us from the start that the usual interpretive rules and procedures must at times bend in the face of finality's demands. We have come to believe that this is such an instance.

Simpson remains the most persuasive precedent within our ken. There, the taxpayer, an incorporated pawnshop, had not filed special "personal holding company" returns as required by law for the tax years 1934-1936. *Simpson*, 321 U.S. at 226. Consequently, despite the absence of fraud or bad faith, the government imposed not only surtaxes but penalties (which the taxpayer contested). *Id.* The Board of Tax Appeals (predecessor to the present Tax Court) affirmed, 44 B.T.A. 498 (1941), as did the court of appeals, 128 F.2d 742 (2d Cir. 1942) (per curiam). The Supreme Court denied certiorari on November 9, 1942. 317 U.S. 677. Thereafter, *Simpson* filed an out-of-time petition for rehearing; the Court granted it provisionally and vacated the earlier denial of certiorari, specifi-

cally asking counsel to address the issue of the Court's jurisdiction to rehear the case, given, *inter alia*, the finality provisions of the Internal Revenue Code. *Simpson*, 321 U.S. at 227; *see also* 391 U.S. 778 (1943) (order granting rehearing).

Following oral argument, the Court determined that it lacked jurisdiction over a case in which the rehearing petition was filed beyond the 25-day period. 321 U.S. at 230. The Court spoke explicitly to the question of finality and denied itself the inherent authority to rehear tax cases out of time:

> If, therefore, we follow the practice heretofore observed, by which we regard denials of certiorari as qualified until the 25-day period expires, we put the denial and the decision on a generally equal basis except as Congress has seen fit to give the latter . . . additional . . . days before finality. The Government after consideration of the practical aspects of the question advises that in its view our practice in these matters has been 'salutary and in accordance with sound policy.' There appears to be no good reason, therefore, to hold that the rule as to rehearings, in so far as it permits as matter of right the filing of petition therefor within 25 days, may not apply to this class of cases. But when under our rules our decision has become final, this statute deprives us of jurisdiction over the case.

Id. at 229-30. The lesson of *Simpson* is that the Court's jurisdiction is preserved for the period specified in its rules. Had the Court interpreted the statute literally — "final" means "final," "denial" means "entry of an order denying" — the Court's own rehearing rules could not have endured, inasmuch as the Justices had previously determined that they possessed no jurisdiction to reopen a tax case finally decided. *See Helver-*

ing v. *Northern Coal Co.*, 293 U.S. 191, 193 (1935) (per curiam).

A hoary decision of this court also assists our inquiry. Well before *Simpson* emerged, Chief Judge Magruder wrote that "in litigation affecting the public revenue the need of finality is the more obvious, from the taxpayer's, as well as from the Government's, point of view." *Sweet*, 120 F.2d at 81. Recognizing that clarity and finality have a symbiotic relationship, Judge Magruder foreshadowed what we might now call a Simpsonesque interpretation: "final" for this purpose may refer not to the date of denial of certiorari (notwithstanding use of the term), but "perhaps [depends] upon the lapse of twenty-five days, ... during which period, under the rules of the Supreme Court, the petitioners might have asked for a rehearing." *Id.* at 80. In our judgment, *Simpson* conclusively proved the accuracy of the *Sweet* augury.[4]

IV

Hanover nimbly attempts to avoid the embrace of *Simpson*, asseverating that the Court was interested only in jurisdiction, not in the (slightly different) question of when, under the statute, the decision below became final. We do not think *Simpson* can be so blithely dismissed. The Court plainly foretold the outcome of our inquiry by declaring that the statutory finality provisions must be read in conjunction with the rule as to rehearings. *Simpson*, 321 U.S. at 229-30. And, any reasonable doubt as to the gravamen of *Simpson* is extinguished by a reading of the dissent, which makes manifest the degree to which finality was the Court's key concern. *See Simpson*, 321 U.S. at 230 (Douglas, J., dissenting).

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[4] *Sweet* dealt with section 1005(a)(3) of the Revenue Act of 1926; *Simpson* focused upon section 1140(b)(2) of the Internal Revenue Code of 1940. These earlier statutes used materially identical language — language no different in any relevant respect from that contained in the present section 7481(a)(2)(B).

Appellant's next initiative — which hinges upon a change in the Supreme Court's rules — strikes us as sorely misdirected. Rule 23.3,[5] upon which Hanover relies, is merely a notification provision, without substantive effect. We find ourselves at a loss to understand how notification anent a decision can be construed to affect the decision's finality. *Cf. Flynn* v. *United States*, 75 S. Ct. 285, 286 (1955) (although denial of certiorari not definitive until rehearing period elapses, "there is no reason for withholding notification of the denial of a petition for certiorari for the full duration afforded for the filing of a petition for rehearing") (Frankfurter, J., opinion in chambers).

We are bolstered in our conclusion by the carefully-chosen language of Rule 23.3. Under *Simpson*, there is no suggestion that the Court's order denying certiorari is "suspended." To the contrary, the order takes effect and begins the running of the 25-day period during which a rehearing motion may be lodged. But, the order is qualified — that is, subject to vacation — in order to preserve the integrity of the Court's rehearing rules. In that sense, the order is "limited; restricted; . . . or temporary." *Black's Law Dictionary* 1117 (5th ed. 1979) (defining "qualified"), but not "interrupt[ed] . . . postpone[d] . . . or stay[ed]." *Id.* at 1297 (defining "suspended"). As we see it, qualification is a potential and partial limit for a particular purpose, whereas suspension works a delay of the entire decision for all purposes. *See, e.g., Richmond* v. *Arizona*, 434

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[5] The rule provides in pertinent part (with respect to orders denying certiorari):

> The order of denial will not be suspended pending disposition of a petition for rehearing. . . .

Sup. Ct. R. 23.3. The rule was adopted in 1980. That it is strictly a notice provision is not much in doubt. It is a direct lineal descendant of former Rule 25.2, which provided that "*notification* [of denial of certiorari] will not be withheld pending disposition of a petition for rehearing. . . ." (emphasis supplied). *See* 13 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* ¶ 823.02 (2d ed. 1988). Hanover offers no basis for an argument that present Rule 23.3 was designed to change the substantive meaning of the previous rule.

U.S. 1323, 1325 (1977) (Rehnquist, Circuit Justice) (opinion in chambers on motion for rehearing of order denying certiorari).

Hanover also argues that its reading of section 7481 promotes certainty in the administration of the assessment/collection process, thus furthering Congress's intent. But, this argument possesses two major flaws. For one thing, courts have long reasoned that Congress intended "final," as used throughout what is now section 7481, to mean "that at the indicated point of time the decision of the [Tax Court] must stand as rendered, *without power . . . in the courts to modify it thereafter*." *Sweet*, 120 F.2d at 81 (emphasis supplied); *see also Kenner*, 387 F.2d at 690 ("Finality accrues promptly after the exhaustion of the possibilities of direct review."); *Claremont Waste Mfg. Co.* v. *Commissioner*, 238 F.2d 741, 744 (1st Cir. 1956) (" 'final' in this connection means final in an absolute and literal sense; at the indicated point of time tax consequences of the decision by the Tax Court become irrevocably fixed . . . without power in the Tax Court or in any other court to modify it thereafter"). Given the precedential trail, continuing to define finality in this way advances congressional intent, rather than undermining it.

For another thing, Hanover's interpretation does not bring any greater measure of certitude to the process. We offer a few examples. (1) Beginning the count before the time for the Court to rectify its own mistakes has passed ignores the error-correcting function and, potentially, squanders resources, *e.g.*, by requiring assessments to be made unnecessarily. While rehearings may be rare, they are certainly not unprecedented; as Justice Frankfurter admonished, "[t]he right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied." *Flynn*,

75 S. Ct. at 286.[6] (2) If, notwithstanding the start of the count, the Court would retain its capacity to rehear cases for the 25-day period, section 7481(a)(2)(B) would become meaningless in cases where rehearing was granted. To that extent, Congress's evident desire for finality and predictability would be unfulfilled, indeed, thwarted. (3) The practical ramifications of Hanover's alternative interpretation are extremely murky. If a decision become final upon denial, but the period for rehearing remains operative, when does the statute of limitations begin its march if rehearing is granted? When, if a timely rehearing petition is taken under advisement? Assuming (favorably to Hanover) that such problems could readily be solved in future litigation, there is little to be said for a rule which creates such ample opportunity to construct caselaw castles in the air. The precision Congress concededly sought was meant to stem, not encourage, hypertechnical litigation.

V

We need go no further. Because "the denial of a petition for certiorari should not be treated as a definitive determination" in the Supreme Court until the period for filing a rehearing petition has expired, *Flynn*, 75 S. Ct. at 286, we believe that Congress, when it used the term "denial" in 26 U.S.C. § 7481(a)(2)(B), meant that word to connote the time when the act became unalterable. As courts before us have done in related contexts, we thus recognize that a decision of the Tax Court is not final in the requisite sense until it can no longer be modified, that is, until the time to file for rehearing of a denial of certiorari has passed. In this case, therefore, the date

[6] According to one report, roughly 0.8% of rehearing petitions filed during the period 1976-1982 were granted. *See* Stern, Gressman & Shapiro, *Supreme Court Practice* 624 (6th ed. 1986) (tabulating grants of rehearing in nonindigent cases).

of the Supreme Court's "denial of a petition for certiorari" under 26 U.S.C. § 7481(a)(2)(B) meant the date upon which the Rule 51 rehearing period expired, unused. Accordingly, the IRS seasonably perfected its assessment against Hanover.

Affirmed.

Appendix B

11JM SA 12-1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HANOVER INSURANCE COMPANY

v. Civil Action
No. 86-3649Mc

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER
December 31, 1987

McNAUGHT, D.J.

This suit for the refund of taxes was submitted to the court for a decision on the issue of the statute of limitations, after the parties entered into a stipulation of facts. The question to be resolved now is when a decision of the Tax Court became final. "The Joint Stipulation of Facts" is appended hereto and made a part hereof.

The plaintiff here, as agreed in the stipulation, is the successor in interest to the Massachusetts Bonding Company which filed its federal income tax for the taxable year ending December 31, 1960 with the Internal Revenue Service. By reason of a series of consents, the statute of limitations for assessment of tax was extended to June 30, 1971. In brief, after issuance of a Notice of Deficiency, Hanover filed a petition in the Tax Court. A decision, contrary to Hanover, was entered by the Tax Court on March 30, 1978, finding a deficiency in the amount of $331,644.28. Hanover took an appeal to the First

Circuit Court of Appeals, where the Tax Court decision was affirmed May 8, 1979. [*Hanover Insurance* v. *Commissioner*, 598 F.2s 1211 (1st Cir., 1979)]

On July 27, 1979 a petition for writ of certiorari was filed by Hanover in the Supreme Court of the United States. We take judicial notice of the fact that the Supreme Court denied that petition October 15, 1979. *Hanover Insurance Co.* v. *Commissioner*, 444 U.S. 915 (1979)

For purposes of this proceeding, at least, I assume that on December 10, 1970 the statutory notice of deficiency was mailed to the plaintiff for the tax year ending December 30, 1960. (Hanover questions the date of mailing of the Notice of Deficiency, claiming it was not received until December 21, 1970, but says that if the Court accepts its interpretation of Section 7481(a)(2)(B) of the Code, the assessment was untimely even if mailed on December 10th). At that time, then, 202 days remained for assessment. See paragraphs 7 and 8 of defendant's Answer to the Complaint. We add to that the sixty days provided by 26 U.S.C. § 6503(a)(1) following final decision of the Tax Court, making a total of 262 days. That brings us to June 30, 1971. There followed the Tax Court petition, the decision of the Tax Court, the decision of the Court of Appeals, the denial of certiorari.

A deficiency ($331,644.28 in tax and $358,562.55 in interest) was assessed by the IRS for the 1960 taxable year on July 23, 1980. A notice of levy was served on April 17, 1985 on Shawmut Worcester County Bank, and on April 22, the IRS received $1,161,324.38. Hanover made claim for a refund of that amount on November 22, 1985, which was disallowed. This suit, of which we have jurisdiction by virtue of 28 U.S.C. ¶1346(a)(1) followed.

Hanover, in a nutshell, claims that the assessment on July 23, 1980 was barred by the statute of limitations applicable to assessments, 26 U.S.C. ¶6501. The United States says that the assessment was timely.

Section 6501(a)(1) requires that a tax be assessed within three years after the return is filed, except as otherwise provided, and Section 6501(c)(4) provides for extension by agreement. The consents referred to above provided extensions to June 30, 1971. Next we had the court proceedings concluding with the denial of certiorari on October 15, 1979. Plaintiff says that at that time the decision of the Tax Court was "final", and that July 23 was more than 262 days after October 15, 1979; ergo, the assessment was untimely and the levy was illegal. The United States responds and says that twenty-five days have to be added to the statutory period, since either party could request a rehearing within 25 days of the denial of certiorari.

We look to Section 7481(a)(2)(B) (which was derived from Section 1140 of the Internal Revenue Code of 1939, and ultimately from Section 1005 of the Act of 1926. It provides that where a petition for certiorari is denied, the decision of the Tax Court "shall become final" "[u]pon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals . . ." Read literally, the contention of the plaintiff seems well taken.

The defendant calls our attention to the case of *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225 (1944) which involved Section 1140(b)(2) of the Internal Revenue Code of 1939. That provision is identical to Section 7481(b)(2)(B) of the Internal Revenue Code of 1954. In *Simpson*, the Supreme Court said, at page 229, 230: ". . . Our rules provide for petitions for rehearing as a matter of right within 25 days after judgment,

and this rule has been applied to petitions for rehearings of orders denying certiorari. We have applied it to cases falling within the purview of ¶1140(b)(2). No mandate issues on denial of certiorari, and after a final decision, the mandate does not issue until expiration of the 25-day period within which petition for rehearing may be filed. If, therefore, we follow the practice heretofore observed, by which we regard denials of certiorari as qualified until the 25-day period expires, we put the denial and the decision on a generally equal basis except as Congress has seen fit to give the latter an additional thirty days before finality."

The plaintiff argues in its brief that the Court's holding did not suggest that a denial of a petition for certiorari is in any way "qualified" for purposes of applying the statute of limitations. I am impressed by the argument, but not persuaded by it, even in the light of the fact that Congress explicitly provided that if the Supreme Court directed that the decision of the Tax Court be affirmed, or the appeal dismissed, the decision of the Tax Court does not become final until 30 days from the issuance of the mandate of the Supreme Court. Section 7481(a)(2)(C) so provides. There is a similar explicit provision under Section 7481(a)(3)(A). The provision with which we are concerned makes no reference to any additional period of time. On the other hand, the dissent in *Simpson*, authored by Mr. Justice Douglas, concurred in by Justices Murphy and Rutledge, begins: "I can find no warrant in ¶1140 of the Internal Revenue Code for saying that the decision of the Tax Court becomes 'final' only after the expiration of the 25-day period within which a petition for rehearing may be filed". The dissenters, it appears, interpreted the decision as does the defendant here, and as do I.

I decide the issue of the "finality" of the Tax Court decision in favor of the defendant. I rule that the Tax Court decision

did not become final until twenty-five days after the denial of certiorari.

The matter, however, is not ended. The parties are directed to contact the courtroom clerk for our session to determine a date on which we may confer to decide upon the necessity (or non) for an evidentiary hearing as to the date on which the notice was mailed.

John J. McNaught
United States District Judge

Appendix C

I.R.C. § 7481, 26 U.S.C.A. § 7481 (1989).

§ 7481. Date when Tax Court decision becomes final

(a) Reviewable decisions. — Except as provided in subsections (b), (c), and (d), the decision of the Tax Court shall become final —

(1) Timely notice of appeal not filed. — Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; or

(2) Decision affirmed or appeal dismissed. —

(A) Petition for certiorari not filed on time. — Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissesd by the United States Court of Appeals and no petition for certiorari has been duly filed; or

(B) Petition for certiorari denied. — Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals; or

(C) After mandate of Supreme Court. — Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the appeal dismissed.

(3) Decision modified or reversed. —

(A) Upon mandate of Supreme Court. — If the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either

the Secretary or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(B) Upon mandate of the Court of Appeals.—If the decision of the Tax Court is modified or reversed by the United States Court of Appeals, and if—

(i) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(ii) the petition for certiorari has been denied, or

(iii) the decision of the United States Court of Appeals has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the United States Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(4) Rehearing.—If the Supreme Court orders a rehearing; or if the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, and if—

(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(B) the petition for certiorari has been denied, or

(C) the decision of the United States Court of Appeals has been affirmed by the Supreme Court,

then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered.

(5) Definition of "mandate".—As used in this section, the term "mandate", in case a mandate has been recalled

prior to the expiration of 30 days from the date of issuance thereof, means the final mandate.

(b) Nonreviewable decisions.—The decision of the Tax Court in a proceeding conducted under section 7463 shall become final upon the expiration of 90 days after the decision is entered.

(c) Jurisdiction over interest determinations.—Notwithstanding subsection (a), if—

(1) an assessment has been made by the Secretary under section 6215 which includes interest as imposed by this title,

(2) the taxpayer has paid the entire amount of the deficiency plus interest claimed by the Secretary, and

(3) within 1 year after the date the decision of the Tax Court becomes final under subsection (a), the taxpayer files a petition in the Tax Court for a determination that the amount of interest claimed by the Secretary exceeds the amount of interest imposed by this title,

then the Tax Court may reopen the case solely to determine whether the taxpayer has made an overpayment of such interest and the amount of any such overpayment. If the Tax Court determines under this subsection that the taxpayer has made an overpayment of interest, then that determination shall be treated under section 6512(b)(1) as a determination of an overpayment of tax. An order of the Tax Court redetermining the interest due, when entered upon the records of the court, shall be reviewable in the same manner as a decision of the Tax Court.

(d) Decisions relating to estate tax extended under section 6166.—If with respect to a decedent's estate subject to a decision of the Tax Court—

(1) the time for payment of an amount of tax imposed by chapter 11 is extended under section 6166, and

(2) there is treated as an administrative expense under Section 2053 either —

(A) any amount of interest which a decedent's estate pays on any portion of the tax imposed by Section 2001 on such estate for which the time of payment is extended under Section 6166, or

(B) interest on any estate, succession, legacy, or inheritance tax imposed by a State on such estate during the period of the extension of time for payment under section 6166,

then, upon a motion by the petitioner in such case in which such time for payment of tax has been extended under section 6166, the Tax Court may reopen the case solely to modify the Court's decision to reflect such estate's entitlement to a deduction for such administration expenses under section 2053 and may hold further trial solely with respect to the claim for such deduction if, within the discretion of the Tax Court, such a hearing is deemed necessary. An order of the Tax Court disposing of a motion under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.

Appendix D

Supreme Court Rules (1989).

Rule 23. Disposition of petition for certiorari

.1. After consideration of the papers distributed pursuant to Rule 22, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

.2. Whenever a petition for writ of certiorari to review a decision of any court is granted, an order to that effect shall be entered, and the Clerk forthwith shall notify the court below and counsel of record. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court. A formal writ shall not issue unless specially directed.

.3. Whenever a petition for writ of certiorari to review a decision of any court is denied, an order to that effect will be entered and the Clerk forthwith will notify the court below and counsel of record. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice thereof.

Appendix E

Supreme Court Rules (1939).

Rule 33

REHEARING.

A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

Appendix F

Supreme Court Rules (1939).

Rule 34

MANDATES.

Mandates shall issue as of course after the expiration of twenty-five days from the day the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the court, or of a justice thereof when the court is not in session. (See Rules 31 and 35.)

No mandate issues upon the denial of a petition for writ of certiorari. Whenever application for a writ of certiorari to review a decision of any court is denied, the clerk shall enter an order to that effect, and shall forthwith notify the court below and counsel of record.

Appendix G

Supreme Court Rules (1989).

Rule 51. Rehearings

.1. A petition for rehearing of any judgment or decision other than one on a petition for writ of certiorari, shall be filed within 25 days after the judgment or decision, unless the time is shortened or enlarged by the Court or a Justice. Forty copies, produced in conformity with Rule 33, must be filed (except where the party is proceeding *in forma pauperis* under Rule 46), accompanied by proof of service as prescribed by Rule 28. Such petition must briefly and distinctly state its grounds. Counsel must certify that the petition is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel. A petition for rehearing is not subject to oral argument, and will not be granted except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court. See also Rule 52.2.

.2. A petition for rehearing of an order denying a petition for writ of certiorari shall comply with all the form and filing requirements of paragraph .1, but its grounds must be limited to the intervening circumstances of substantial or controlling effect sor to other substantial grounds not previously presented. Counsel must certify that the petition is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the manuscript signature of counsel or of the party when not represented by counsel. A petition for rehearing without such certificate shall be rejected by the Clerk. Such petition is not subject to oral argument.

.3. No response to a petition for rehearing will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response.